



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
**REGION 9**  
75 Hawthorne Street  
San Francisco, California 94105

Mr. David Kimball  
Gallagher & Kennedy  
2575 E. Camelback Road, Suite 1100  
Phoenix, Arizona 85106-9225

SEP 26 2018

Dear Mr. Kimball:

On July 19, 2018, you wrote a letter to Regional Administrator Michael Stoker regarding the Roosevelt Irrigation District's (RID's) proposed remediation project for the West Van Buren WQARF Site. At the request of Administrator Stoker, this letter attempts to respond to the July 19, 2018 correspondence, which raises issues that are similar to those raised in previous correspondence. On June 18, 2018, Region 9 responded to your correspondence of March 15, April 18, May 16, and May 29, 2018. As noted in our response, Region 9 is evaluating the Arizona Department of Environmental Quality's (ADEQ's) April 2018 request that the Environmental Protection Agency (EPA) either extend the Motorola 52<sup>nd</sup> Street Superfund Site into the West Van Buren WQARF Site or evaluate West Van Buren for listing on the National Priorities List (NPL). Region 9 appreciates RID's interest in cleaning up the aquifer and protecting human health and the environment. However, the Region needs to evaluate whether the site warrants EPA involvement before considering any proposals to address it.

The process to evaluate adding the West Van Buren WQARF Site to the NPL or expanding the existing Motorola 52<sup>nd</sup> Street Superfund Site boundaries is complex and will take time to complete. The NPL evaluation and listing process is a rule making that is done by EPA headquarters. The NPL listing process has multiple phases, including seeking concurrence from the Governor. If concurrence from the Governor is obtained, it often takes a year or more from the Governor's concurrence to get a site proposed to the NPL. If the comments are extensive, as they could be for West Van Buren given all of the competing interests, it can take another year or more for EPA to make a final determination on whether to finalize a proposed NPL site. Finally, once a site is listed, it has to compete with all of the other NPL sites for staff and funding resources.

Until EPA evaluates the West Van Buren WQARF Site for NPL listing or as an additional operable unit for the Motorola 52<sup>nd</sup> Street Site, it is premature to enter into agreements with any party to conduct work on EPA's behalf, particularly remedial groundwater work. While EPA proceeds with our evaluation process, we encourage your cooperation in ensuring that the process moves as efficiently as possible, and we anticipate that RID will continue to ensure that its activities do not exacerbate pathways for contaminant exposure.

If EPA becomes the lead agency as a result of NPL listing, we will follow the standard Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) process to determine the appropriate remedy. Although this evaluation would take advantage of the work that has been done by the parties and ADEQ over the years, it would still require a remedial investigation and feasibility study (RI/FS), public comment on the proposed remedy, and an enforceable agreement to implement the selected remedy (which is generally done as a consent decree involving the Department of Justice).

You requested that EPA enter into a “cooperative agreement” with RID pursuant to CERCLA section 104 (42 U.S.C. §9604) under which RID would operate a pump and treat remedial action. Section 104 sets forth EPA’s authority to enter into agreements with parties to conduct investigations and response actions and/or to recover site-related costs. This authority is generally directed to agreements for those conducting work on EPA projects. EPA does not enter into agreements to oversee remedial activities developed under state programs where EPA was not involved in the investigation, evaluation of remedial alternatives, and selection of the response action. EPA has not had any involvement in the investigation of the nature and extent of the contamination at the West Van Buren WQARF Site and is not in a position to select and oversee implementation of a remedy at this juncture.

The West Van Buren WQARF Site involves groundwater contamination, and the cleanup of groundwater contamination can take substantial time, as well as significant funding, to accomplish. EPA does not embark upon a large groundwater cleanup project without first placing the Site on the NPL or, at a minimum, first determining that the Site would have a sufficient Hazard Ranking Score (HRS) to be placed on the NPL.<sup>1</sup> While your letter asserts that RID will perform the groundwater cleanup using “private funds” without the need to resort to federal Superfund monies, EPA does not select and oversee long-term remedial actions without the assurance that the Superfund will be available in the event the performing party is unable to meet the requirements of the remedy that EPA has selected in its Record of Decision.

Your April 18, 2018 letter cites to an agreement with the Atlantic Richfield Company (ARC) at the Anaconda Site as a model EPA should follow at the West Van Buren WQARF Site. However, the underlying situation at West Van Buren WQARF Site is not at all like Anaconda. In February of 2018, EPA resolved our past costs for the Anaconda Site with ARC in a separate administrative settlement and entered into a Deferral Agreement with the State of Nevada to defer NPL listing to allow the State to oversee the cleanup using state authorities.<sup>2</sup> At the same time, ARC entered into a separate administrative agreement with the State of Nevada to implement the RI/FS and the remedial action for an operable unit that had already been jointly selected by EPA and Nevada. The State of Nevada and ARC intend to enter into future agreements to perform the remedies selected for other operable units after the completion of the RI/FS.

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<sup>1</sup> It is also necessary for a Site to have a sufficient HRS score to warrant listing before EPA will evaluate it for a Superfund Alternative Site approach.

<sup>2</sup> EPA did not defer the portion of the Anaconda Site that is on Tribal Land.

The West Van Buren WQARF Site is factually very different from Anaconda. The West Van Buren WQARF Site has not been proposed for the NPL and RID is seeking EPA oversight of a remedy before EPA has made a determination regarding whether to take the lead under CERCLA. Instead of EPA and the State having jointly selected the remedy like Anaconda, the West Van Buren WQARF Site is State lead and ADEQ has not selected a remedy. The West Van Buren Working Group (WVBWG) submitted a remedial proposal that is different from RID's proposal, but ADEQ did not select either proposal. Instead, ADEQ asked the WVBWG and RID to work together and submit a joint proposal, but the parties were unable to do so in part because of a disagreement about the appropriate end use of the water.

EPA has an "enforcement first" policy under Superfund and looks to have the potentially responsible parties (PRPs) perform the work. In rare instances, non-labile parties may also play a role in performing a portion of the response action with EPA oversight. However, as required by CERCLA and the National Contingency Plan, EPA is required to involve all of the stakeholders in the RI/FS and remedy selection process including: ADEQ, the City of Phoenix, Salt River Project (SRP), the potentially responsible parties, the community, RID, and any other interested local governments.

You indicated in our March 13, 2018 meeting that RID would like to enter into a cooperative agreement with EPA to enable RID to have certainty regarding water withdrawal from the aquifer to support the groundwater remediation necessary for reuse. However, an agreement with EPA would not accomplish this. Even if EPA were to require a CERCLA remedy, it would not provide for water withdrawal rights.

CERCLA does not address water rights and EPA does not have a role in the ongoing water rights dispute between RID and the United States, SRP, and the City of Phoenix. On August 10, 2018, Mayor Thelda Williams of the City of Phoenix sent a letter to Regional Administrator Stoker requesting that Region 9 refrain from entering into any remediation agreement that would take water outside of the City of Phoenix and SRP service area. RID is also involved in two lawsuits with the United States and SRP over the water rights necessary to implement RID's proposed remedy. EPA's authority under Superfund is to protect human health and the environment by selecting protective remedies. For groundwater sites, this often requires pumping and treating contaminated water and selecting an implementable end use. However, CERCLA does not address water rights or mandate the end use of water. Given that RID is 1) in a disagreement with the City of Phoenix, SRP, and the WVBWG regarding the end use of the water and 2) in litigation against the United States and SRP, Region 9 is not inclined to take a position on what the end use of the water should be or who has the pertinent water rights.<sup>3</sup>

We will keep you informed of our response to ADEQ's request. If you have any questions, please contact Dustin Minor in our Office of Regional Counsel at

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<sup>3</sup> I am not aware of EPA ever selecting or agreeing to oversee a remedy that is inconsistent with the position that the United States is taking in separate water rights litigation, but anticipate that the Agency would coordinate with our sister agencies and the Department of Justice before doing so.

minor.dustin@epa.gov or (415)972-3888. Mr. Neese may contact me or Angeles Herrera, Assistant Director, at herrera.angeles@epa.gov or (415)972-3144.

Sincerely,

A handwritten signature in black ink, appearing to read 'Enrique Manzanilla', with a long horizontal flourish extending to the right.

Enrique Manzanilla, Director  
Superfund Division

cc: Donovan Neese, Superintendent, Roosevelt Irrigation District  
Misael Cabrera, Director, Arizona Department of Environmental Quality  
Thomas Buschatzke, Director, Arizona Department of Water Resources